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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

NICK JULIAN HERRAN,

Defendant and Appellant.

B265707

(Los Angeles County  
Super. Ct. No. MA065101)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Daviann L. Mitchell, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Nick Julian Herran pleaded no contest to one count of mayhem and admitted he had personally used a dangerous or deadly weapon in committing the offense. Pursuant to the terms of the negotiated agreement, Herran was sentenced to an aggregate state prison term of nine years. Execution of the sentence was stayed, and Herran was placed on five years' probation with conditions including that he serve 180 days in county jail—time he had already served as of the date of sentencing. On appeal from the judgment entered following his no contest plea, Herran contends the court abused its discretion when, prior to sentencing, it denied his motion to withdraw the plea based on his showing that he had discharged his retained counsel during negotiation of the plea agreement and, as a result, he did not understand the terms of the agreement or knowingly consent to it. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The Original Charges*

In the early morning of January 1, 2015 Herran and Michael Wooden had a heated argument over Wooden's girlfriend. Both men were intoxicated. After Wooden locked Herran out of the house, Herran pounded on the door demanding the return of the beer he had purchased. Wooden stepped out to the front porch. Herran rushed toward him, Wooden punched Herran, and Herran pushed Wooden backward. Wooden felt a stabbing sensation and saw blood on his shirt. He was taken to a hospital for treatment. He received staples for a wound on his shoulder and stitches for a cut on his cheek. When Herran was arrested 10 days later, he had metal knuckles with a knife blade in his pants pocket.

Herran was represented at the preliminary hearing by Mario Barrera, an alternate public defender. The court found sufficient cause to bind Herran over for trial for assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and possession of metal knuckles (Pen. Code, § 21810). In an information filed February 9, 2015 Herran was charged with those two felonies and first degree burglary (Pen. Code, § 459). The information specially alleged that in committing the assault Herran had inflicted great bodily injury

on Wooden (Pen. Code, § 12022.7, subd. (a)). The maximum sentence for the offenses alleged was nine years. Herran was arraigned on February 9, 2015, again represented by Barrera, and pleaded not guilty to all charges and denied the special allegations and enhancements. At a pretrial conference on March 9, 2015 Jesus Zuniga, a privately retained attorney, substituted in as Herran's counsel.

## *2. Plea Negotiations and Entry of the No Contest Plea*

On April 3, 2015 Zuniga and Deputy District Attorney Carolyn Yeh advised the court a plea agreement had been reached. The People moved to amend the information to add a charge of mayhem (Pen. Code, § 203) with a special allegation Herran had personally used a deadly or dangerous weapon in committing the offense (Pen. Code, § 12022, subd. (b)(1)). Yeh explained Herran had agreed to the new charge with a sentence of eight years (the high term) plus one year for the weapon-use enhancement. Execution of the sentence would be suspended with five years of formal probation. Herran would receive credit for time served (180 days including custody credits) upon his acceptance into a residential treatment program.

The court asked Herran, "Sir, have you had the opportunity to talk to your lawyer about the charges, defenses, penalties and your rights?" Herran responded "yes." The court then inquired, "Do you want to accept the offer that's been extended to you?" Herran again answered "yes." The court proceeded to confirm that Herran had read, understood and signed the multi-page advisement of rights, waiver and plea form. The court then took a formal waiver of trial rights, and Herran pleaded no contest to count 4 of the amended information and admitted he had personally used a knife as to that count. The court set April 30, 2015 for receipt of a probation report and the sentencing hearing.

## *3. Appointment of New Counsel and the Motion To Withdraw the Plea*

On April 30, 2015 Herran told the court Zuniga had been terminated as his attorney on April 3, 2015. The court apparently believed Herran was reporting that Zuniga had been suspended from practice. Deputy District Attorney Yeh explained, "I don't know if the court recalls, but on the last court date when the plea was taken, I think

there was an issue of the defendant's father wanting to terminate and fire Mr. Zuniga, but Mr. Herran was questioned and Mr. Herran indicated he was okay with keeping Mr. Zuniga as his counsel. I think that's where this issue is stemming from."

The court examined the transcript of the plea hearing and told Herran, "There's nothing in the transcripts indicating that you did not want counsel to represent you. So if you would like to relieve counsel at this time, you may do that . . . . You have the right to terminate him now. . . . There's no indication on the record ever that you were not satisfied with your attorney. There may have been discussions, but there's nothing on the record to indicate there was an issue at all." The court then reappointed the Alternate Public Defender's Office to represent Herran and continued the hearing to May 21, 2015.

On May 21, 2015, Alternate Public Defender Mario Barrera, once again representing Herran, filed a single-page motion to withdraw plea asserting, "Herran did not know what he was doing when he signed the waiver form nor did he know what he was doing when he responded to the judge's questions during the taking of the plea." The hearing was continued to May 28, 2015.

At the May 28, 2015 hearing Herran, Herran's father, Louis Herran, and Deputy District Attorney Yeh testified regarding the factual basis for the motion to withdraw.<sup>1</sup> According to Herran, while Zuniga was negotiating with Yeh on April 3, 2015, both Herran and his father, who had hired Zuniga to represent Herran, told Zuniga he was terminated. Herran also asserted he had sent Zuniga a letter saying he was fired as his lawyer (no copy of the letter was presented to the court), but Zuniga did not pay attention to them. Instead, Zuniga continued to negotiate with Yeh. Then Zuniga told Herran that once he signed and initialed the paperwork, he would be released; but Zuniga did not explain the terms of the plea agreement to him, specifically, that he would be pleading guilty to a crime he did not commit. Herran insisted that he told Zuniga he wanted to go

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<sup>1</sup> Yeh made several short statements and answered the court's questions before being sworn in by the clerk. Before the court ruled, Yeh swore under penalty of perjury that everything she had said was true.

to trial, that he had been in jail for five months and wanted a trial to prove he was innocent, not simply to be released from custody. Zuniga told Herran just to listen to the judge when they went back into court and to follow Zuniga on what he should say.

Herran's father testified he spoke to Zuniga and Deputy District Attorney Yeh before the plea was taken and told Yeh that Zuniga had been terminated. Zuniga said they should speak directly to Herran about Zuniga continuing to act as his attorney. Yeh explained that the matter of representation would have to be presented by Herran or his father to the judge. Although Louis Herran told Yeh he did not have a problem with that, "that never happened."

Deputy District Attorney Yeh testified Zuniga was still Herran's attorney when they negotiated the plea agreement. While the negotiations were continuing, Louis Herran spoke to Yeh and told her he had tried to fire Zuniga. She informed him only the defendant could discharge his lawyer. As she recalled, when Herran was brought into the courtroom after the negotiations had been concluded and Herran had conferred with Zuniga, the court inquired whether Herran still wanted to continue with Zuniga representing him and go forward with the plea. Herran said yes. "Otherwise, we would never have gone through with the plea," Yeh insisted.

The court noted it had personally taken the plea and Herran's admissions and stated it had "a recollection, not of all the details, but I do have a recollection of Mr. Herran and his frustrations." The court stated it remembered becoming aware of an issue about representation and recalled asking informally if Herran wanted Zuniga to continue to represent him. The court then stated, "I have an independent recollection of Mr. Herran representing to me that he did, in fact, want this attorney to represent him." The court reviewed for the record the colloquy during the plea hearing in which Herran confirmed he had spoken to his lawyer about the charges and his rights and concluded, "So that clarifies to me that there was absolutely no confusion, one, that he was having that attorney represent him, and two, that he understands what the disposition was, what the offer was, and specifically indicated to me that he wanted to accept that offer."

The court denied the motion, concluding Herran’s statement that Zuniga was not representing him at the time of the plea lacked credibility. Sentencing was again continued to permit counsel to complete the arrangements for Herran’s participation in a 90-day treatment program. On July 17, 2015 Herran was sentenced in accordance with the terms of his negotiated plea agreement.

Herran promptly filed a notice of appeal from the judgment of conviction. After the trial court granted Herran’s request for a certificate of probable cause (see *People v. Johnson* (2009) 47 Cal.4th 668, 679 [“[a] defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs *after* the guilty plea”]), Herran filed an amended notice of appeal.

## DISCUSSION

### 1. *Governing Law*

A defendant may move to set aside a guilty or no contest plea for good cause at any time before the entry of judgment. (Pen. Code, § 1018.)<sup>2</sup> Good cause includes mistake, ignorance, fraud, duress or any other factor that overcomes the defendant’s exercise of free judgment and must be shown by clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566; *People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416.) It is not enough that a defendant has concluded he or she wrongly assessed the wisdom of the plea bargain or otherwise has had a change of mind. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208; *People v. Knight* (1987) 194 Cal.App.3d 337, 344.) Even “[t]he fact [a defendant] may have been persuaded, or was reluctant, to accept the plea is not sufficient to warrant the plea being withdrawn. [Citation.] ‘Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.’” (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919.) However,

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<sup>2</sup> Penal Code section 1018 provides, “On application of the defendant at any time before judgment . . . the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice.”

“[t]rial courts are expressly directed to give a liberal construction to the provisions of section 1018 in the interest of promoting justice.” (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796-797; accord, *People v. Clancey* (2013) 56 Cal.4th 562, 584.)

A decision to deny a motion to withdraw a guilty or no contest plea rests in the sound discretion of the trial court and is final unless the defendant can show a clear abuse of discretion. (*People v. Superior Court (Giron)*, *supra*, 11 Cal.3d at p. 796.) We are required to accept the trial court’s factual findings if they are supported by substantial evidence (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; see *People v. Archer* (2014) 230 Cal.App.4th 693, 702) and witness credibility determinations if reasonably justified by the record (see *People v. Quesada* (1991) 230 Cal.App.3d 525, 533).

2. *Denial of Herran’s Motion To Withdraw His Plea Was Well Within the Trial Court’s Discretion*

Herran was entitled to effective assistance of counsel in determining whether to accept or reject a negotiated plea agreement. (See *Lafler v. Cooper* (2012) 566 U.S. \_\_\_\_ [132 S.Ct. 1376, 1387, 182 L.Ed.2d 398]; *In re Alvernaz* (1992) 2 Cal.4th 924, 933; *People v. Archer*, *supra*, 230 Cal.App.4th at p. 707.) However, based on the trial court’s factual findings, which were supported by the testimony of Deputy District Attorney Yeh, Herran’s answers to the court’s questions during the plea hearing, his signature on the seven-page waiver form and the court’s independent recollection of events, Herran continued to be represented by Zuniga during the plea negotiations and at the time of the plea itself. Herran acknowledged Zuniga had explained his rights to him and affirmed he understood the waiver and plea form; and the court concluded he was not confused “in any way, shape, or form” as to “what was happening, what his actions were, what his choices were.” On this record the court’s decision to deny Herran’s motion was well within its discretion.

## **DISPOSITION**

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

GARNETT, J.\*

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\* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.